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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1962

No. 660.

JAMES FRANKHOUSER,
Petitioner,

vs.

PATRICIA L. KISSINGER, Administratrix of the Estate of LEE N. KISSINGER, Deceased, and H. M. STERN, Ancillary Administrator,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Your respondents, Patricia L. Kissinger, Administratrix of the Estate of Lee N. Kissinger, deceased, and H. M. Stern, Ancillary Administrator of said estate, pray that the petition of James Frankhouser for a Writ of Certiorari to a decision of the United States Court of Appeals for the Fourth Circuit be refused and that the cause not be reviewed by this Honorable Court, and in support thereof, file their Brief in Opposition to said petition.

OPINIONS DELIVERED IN THE COURT

Your respondents agree with the statement of the petitioner in regard to the opinions below.

JURISDICTION

Your respondents do not disagree as to the statements of the petitioner under the heading "Jurisdiction."

STATUTES INVOLVED

Your respondents do not disagree with the statement of the statutes involved in the petitioner's brief.

QUESTIONS PRESENTED FOR REVIEW

Your respondents do not disagree with the statement of the questions that are presented by review by the petition for a Writ of Certiorari.

STATEMENT OF THE CASE

While the statement of the case of the petition is essentially correct as far as it goes, pursuant to Rule 40, subsection 3 of the Revised Rules of this Honorable Court, your respondents recite the following statement of the case in order to correct omissions made in the statement by the petitioner.

The subject traffic accident occurred on October 16, 1959, at approximately 1:15 A.M. Traffic at the scene of the accident had been very light (R. 18). Both driver

and passenger were thrown from the vehicle to the pavement, by the force of the accident.

Although the speed limit at the scene of the accident was 35 miles per hour (R. 57) and there was a traffic "Slow" sign just prior to the accident scene (R. 57), the official investigators of the Office of Naval Intelligence, who went to the scene to investigate, measured the actual distance of tire marks on and off the pavement to be 51 feet from the point where they left the hard surface of the road and on to the shoulder until they came back on to the highway, at the point of a gouge mark, and then an additional 113 from the gouge mark to the center of where the automobile came to rest on its top (R. 56). Between the gouge mark and the point where the vehicle finally came to rest, upside down, there was some paint, "skip" marks (R. 65). There were six of these marks, which were white in color and similar to the color of the overturned vehicle (R. 66).

The petitioner, Frankhouser, testified he could not remember who was driving at the time of the accident. In fact, it was his contention that he could not remember anything concerning the accident. He could not recall whether he was intoxicated nor could he recall anything concerning when he had left Norfolk on the return trip or who entered the automobile at that time, or any other such pertinent information. The Petitioner has filed an affidavit in these proceedings, in the Trial Court, to the effect that he had no recollection of any of the events.

The petitioner could give no information as to the occurrence of the accident or the events thereafter, and stated that his first recollection was the next morning at

the Naval Hospital in the City of Portsmouth, Virginia, (R. 122). The record was devoid of any medical testimony to support the petitioner's contention that he suffered such lengthy amnesia as a result of the scalp injury he received.

The learned Trial Judge, in his memorandum opinion, made reference to the fact that the petitioner's theory of faulty memory being due to injuries received was not supported by medical testimony (R. 2). "Doctor's Progress Notes" from the official United States Naval Hospital record pertaining to the petitioner, describe the petitioner, who was admitted to the hospital within a matter of hours following the accident, as having a "scalp injury" and as being, at the time of the admission, "alert and cooperative" (Pl. Ex. 6; R. 186, 93).

Following the accident, when the petitioner, Frankhouser, was being interviewed by the investigating civilian police officer, there was an odor of alcohol on his breath (R. 69). At the time of his admission to the hospital several hours later, there was an odor of alcohol on his breath (R. 186); and the physical examination of the petitioner made by the Navy doctors at the Portsmouth Naval Hospital later that same morning, resulted in Medical Diagnoses of his injuries and his condition as including a "laceration of the scalp and forehead" and "simple drunkenness" (R. 96; Pl. Ex. 6; R. 188, 93). At no time was there any medical history of unconsciousness, on the part of the petitioner, Frankhouser, or any brain injury that would have explained his "amnesia."

Pursuant to subpoena duces tecum, the official hospital record of the United States Naval Hospital at Ports-

mouth, Virginia, pertaining to the petitioner, Frankhouser, was produced at the trial. It was described as being the official record kept concerning Frankhouser in the ordinary and normal routine course of the operation of the hospital. At the trial, the petitioner agreed and stipulated that there was no question about the custody of the records and the fact that they were true records and regularly maintained in the normal course of business (R. 91). The record, therefore, was introduced into evidence, as Plaintiff's Exhibit No. 6 (R. 92, 93). At the time of its admission into evidence, the jurors were told that the entries of the hospital record did not per se prove their truth, but were admissible for such weight as the jury saw fit to give the records, they were further told that the record was not conclusive as to any point and was only being admitted under the assumption that records contemporaneously made and regularly maintained have certain evidential value (R. 100).

ARGUMENT

It is respectfully submitted to this Honorable Court that the petitioner has not presented to this Court a cause in which there are special and important reasons for the granting of a Writ of Certiorari to the decision of the United States Circuit Court of Appeals for the Fourth Circuit. On the contrary, it is respectfully submitted that this is merely a controversy between parties, which has now been fairly and properly adjudicated by a Court of competent jurisdiction. Although petitioner has apparently attempted to bring his case within the character of certain reasons for this Honorable Court's granting of a Writ of Certiorari, as evidenced in Rule 19 of the Revised Rules of this Court, we shall follow the order adopted by

the petitioner in his argument and indicate our reasons why it is respectfully submitted such a Writ of Certiorari should not be granted.

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS IN HARMONY WITH APPLICABLE DECISIONS OF THIS HONORABLE COURT.

Petitioner's charge of error in the proceedings in the United States District Court for the Eastern District of Virginia, affirmed by decision of the United States Court of Appeals for the Fourth Circuit, upon which he essentially relies in praying for a Writ of Certiorari, involves a construction and application of *28 U.S.C., Section 1732* popularly known as The Federal Shop Book Law. That section, which was enacted in 1936, provides an exception to the hearsay rule and is grounded on the premise that record entries made in the usual course of a business are likely to be an accurate reflection of the various daily transactions of the business. The statute is correctly set out at page 3 of the petition.

The statute is expressed plainly and in unambiguous language and was construed by this Honorable Court in *Palmer* vs. *Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). This decision did not involve the admissibility of hospital records under the statute, as are involved in the case at bar, and significantly, no error is charged by the petitioner as to the applicability of *28 U.S.C., Section 1732,* to hospital records, but, on the contrary, at page 14 of his petition, he, in effect, admits that hospital records are properly the subjects of the Shop Book Rule. In so admitting, the petitioner has in reality made no concession,

for as has been pointed out in the decision of *Thomas* vs. *Hogan*, 308 F.2d 355, decided September 12, 1962, on the same day as the case at bar by the United States Court of Appeals for the Fourth Circuit, hospital records have been consistently held to be admissible under the statute as indicated by the authorities set out in the decision and for the reasons so concisely stated by Dean McCormick:

> "The safeguards of trustworthiness . . . of the records of a modern hospital are at least as substantial as the guaranties of reliability of the records of business establishments." *McCormick, Evidence*, 609 (1954).

In *Palmer* vs. *Hoffman*, supra, the disputed item of evidence was a signed, written statement of a railroad engineer, who had thereafter died, giving his version of a grade crossing accident in which a locomotive he was operating was involved, and which statement was made two days after the accident, when he was interviewed by an official of the company, and a representative of a State Commission. When this written statement was offered into evidence, it was contended by its proponent that under authority of the 1936 Act, to-wit, *28 U.S.C., Section 695* (now *28 U.S.C. 17, Section 1732*) it was a statement "signed in the regular course of business, it being the regular course of such business to make such a statement." Objection to its introduction was sustained, and the question, therefore, was squarely before this Honorable Court as to whether or not the statement was made "in the regular course" of business within the meaning of the Act. As far as the applicability of the Shop Book Law to the questioned evidence, that was the extent of the question to be decided by this Honorable Court. No where in that decision were

hospital records involved, no where in that decision was any such artificial distinction made as is made at bar by the petitioner, between a record entry and such an entry involving opinion. Therefore, even though petitioner hopefully urges this Honorable Court that it should grant him Certiorari because he says the decision below conflicts with the interpretation given the Federal Shop Book Rule in *Palmer* vs. *Hoffman*, supra, we submit that this is not the case. On the contrary, the subject decision not only is in complete harmony with *Palmer* vs. *Hoffman*, supra, but the latter case would seem certainly to be authority for the subject decision.

The sum and substance of the holding of this Honorable Court in the Palmer case was as stated on page 111 of that decision:

> "We may assume that if the statement was made 'in the regular course' of business, it would satisfy the other provisions of the Act. But we do not think that it was made 'in the regular course' of business within the meaning of the Act. The business of the petitioners is the Railroad business. That business, like other enterprises, entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. . . .
>
> The engineer's statement which was held inadmissible in this case falls into quite a different category. It is not a record made for the systematic conduct of the business as a business. . . . It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails

the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. . . . *The probability of trustworthiness of records because they were routine reflections of the day to day operations of the business would be forgotten as the basis of the rule.* . . . Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability acquired from their source and origin and the nature of their compilation. (Italics ours)

"In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the Court, not in the business. Their primary utility is in litigating, not in railroading."

Accordingly, it is respectfully submitted that the "probability of trustworthiness of records because they were routine reflections of the day to day operations of the business" has been laid down as the test of the applicability of *28 U.S.C., Section 1732,* to records of a business as admissible evidence. The instant decision properly applies and

follows the authority of *Palmer* vs. *Hoffman*, supra, and the decision being simply another application of law previously settled by this Honorable Court, and in harmony with that applicable decision, no special or important reason or basis attaches as a justification for the granting of a Writ of Certiorari to the petition.

II. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

This Honorable Court has construed the Federal Shop Book statute in determining an issue involving the applicability of the statute squarely before the Court. *Palmer* vs. *Hoffman*, supra. That decision discussed in detail and with clarity, the history of the Act and the basis for its enactment. It would appear that all Circuits, before whom the questions has been presented, have applied the statute to hospital records. The great majority of the Circuits have held that records routinely made of diagnoses and scientific tests, in the regular course of a hospital's business are entitled to admission under a presumption of trustworthiness. *Wheeler* vs. *United States*, 93 U.S.App. D.C. 1959, 211 F.2d 19, 22-23 (1953); *White* vs. *Zutell*, 263 F.2d 613 (2d Cir. 1959); *Buckminister's Estate* vs. *Com'r.*, 147 F.2d 331 (2d Cir. 1944); *Reed* vs. *Order of United Commercial Travelers*, 123 F.2d 252 (2d Cir. 1941); *Norwood* vs. *Great American Indemnity Company*, 3 Cir. 146 F.2d 797 (1944); *United States* vs. *Ware*, 247 F.2d 698 (7 Cir. 1957); *Brucker* vs. *Order of United Commercial Travelers*, 217 F.2d 876 (7 Cir. 1954); *Glawe* vs. *Rulon*, 284 F.2d 495 (8 Cir. 1960); *Medina* vs. *Erickson*, 226 F.2d 476, 482-83 (9 Cir. 1955).

In the language of Chief Judge Sobeloff, in *Thomas* vs. *Hogan*, supra, there are decisions "which lend a *measure* of support" to the contrary contention that there is a significant distinction between entries regularly made in the regular course of business in records so regularly maintained that otherwise are admissible into evidence, but by virtue of their being a matter of opinion on the part of the entrant, are inadmissible. However, in view of the weight of authority among the courts of the various circuits, and in view of the few dissenting decisions, which almost generally can be distinguished on other grounds, that provide only "a measure of support" to the contrary argument, we respectfully submit that again there is no significant difference in the holding of the courts of the various circuits that present any special or important reasons for this court granting a Writ of Certiorari.

III. THE INSTANT DECISION DECIDES A ROUTINE CONTROVERSY BETWEEN LITIGANTS IN HARMONY WITH APPLICABLE STATE DECISIONS.

Apparently, in a frantic effort to obtain a Writ of Certiorari, the petitioner charges that the Circuit Court of Appeals has decided a question of local law in a plainly erroneous fashion. We submit that nothing could be further from the true situation and, on the contrary, the applicable Virginia law completely supports the decision in all of its local law aspects.

At the outset, we believe it not amiss to point out that among the considerations governing review on certiorari that this Honorable Court has enunciated, if there were a conflict of the decision of a Court of Appeals with applic-

able state law, it is not *every* difference of such kind that entitle a litigant review on certiorari. On the contrary, those considerations seem to allude to decisions of a Court of Appeals on an *important* state question which is in conflict with a state law. Assuming for the sake of argument alone, that there was any difference between the state law and that applied by the United States Court of Appeals for the Fourth Circuit, at bar, again, this is but a routine controversy between litigants and, while important to the litigants, in no way qualifies as an *important* state question.

However, it is respectfully submitted that on the merits of the allegation itself, i.e., that there is any difference between the decision of the Court below and applicable state law, the petitioner's argument must fail.

While it was conceded that recovery by the decedent's estate against the petitioner, Frankhouser, depended on a finding of gross negligence in the operation of his vehicle by Frankhouser that was the proximate cause of the death, it is respectfully submitted, that there was ample and adequate authority in Virginia law and decisions for the findings made by the jury.

We feel it is significant that while the case was reargued before the Fourth Circuit Court of Appeals, en banc, and decided in favor of the respondents with two Judges dissenting, the dissent raises no question of local law but, on the contrary, makes no mention of local law whatsoever. The dissent was directed solely to the applicability of *28 U.S.C., Section 1732.*

At bar, there was overwhelming evidence that petitioner, Frankhouser, was driving while intoxicated and the Vir-

ginia Court has taken judicial notice of the fact, universally recognized, as stated by Chief Judge Sobeloff, that an operator of an automobile may become incompetent and reckless from drinking. *Crowell* vs. *Duncan*, 145 Va. 489, 134 S.E. 576, 581, 50 A.R. 1425 (1926).

The Virginia Courts have long held that gross negligence, while differing in kind from wilful and intentional conduct, merely differs in degree from ordinary or simple negligence. It has been described as being, "that degree of negligence which shows an utter disregard of *prudence* amounting to complete neglect of the safety of another." *Crabtree* vs. *Dingus*, 194 Va. 615, 618; 74 S.E.2d 54, 56; *Reel* vs. *Spencer*, 187 Va. 530, 535; 47 S.E.2d 359, 361; *Kennedy* vs. *McElroy*, 195 Va. 1078; 81 S.E.2d 436 (1954).

Whether gross negligence has been proved depends on the facts and circumstances of each case, which is governed by its own facts. Ordinarily, the issue is for the jury, and it only becomes a question of law for the Court when reasonable men should not differ as to the proper conclusion to be drawn from the evidence. *Alspaugh* vs. *Diggs*, 195 Va. 1; 77 S.E.2d 362; *Sibley* vs. *Slayton*, 192 Va. 470; 69 S.E.2d 466. In the case of *Hackley* vs. *Robey*, 170 Va. 55, 195 S.E. 689 (1938) a factual situation so strikingly similar to the situation at bar that it, alone, we respectfully submit, is a sufficient response to any contention of error in application of a local law by the petitioner, was presented to the Virginia Supreme Court of Appeals.

There two young men left a restaurant bound for the University of Richmond. The weather was fair and the pavement was dry. Other than the occupants of the car,

there were no eye witnesses to the accident. The defendant suffered a fractured skull and had no recollection of the event, and the passenger was killed instantly when the automobile was driven off the road and involved in a non-collision accident.

In affirming the judgment in favor of the plaintiff, the Virginia Supreme Court of Appeals stated:

> "It is true that we do not have from the lips of any eye witness the story of just what happened. But we think the admitted physical facts in the undisputed circumstances were such as to warrant the jury in inferring how the accident happened, and that it was the result of the gross negligence of the driver of the car.
>
> This tragedy occurred on the main thoroughfare of the largest city in the state. The street is level, straight, and well lighted. While the width of the street diminishes as it approaches the bridge, yet this situation is perfectly obvious. The eight inch curb, which marked the boundary of the street and the abutements of the bridge were plainly visible. At the narrowest point on the bridge this street has a width of 42 feet and 6 inches, which is more than twice that of the usual highway. There were no intervening obstructions, nor was the situation in any way complicated by traffic or other cars. In addition to this the driver of the car was, or should have been, familiar with the situation as he had driven across the bridge only a few minutes before the accident.
>
> And; yet, notwithstanding these conditions and circumstances, we know that the car ran up over the

eight inch curb, sideswiped a lamppost on the sidewalk turning completely over, skidded along the street and across the bridge and came to a stop 189 feet from the first point of collision. It was completely demolished, and both occupants hurled to the pavement.

From these facts, the jury had the right, we think, to infer that young Hackley was driving the car at a very high rate of speed; that he was not maintaining a lookout for a situation which was plainly obvious to him, if, indeed, he was not actually familiar therewith; and that, under the circumstances, this constituted gross negligence."

We, in our case, have superimposed on the almost identical factual situation the added fact of gross intoxication of the driver, which was not a factor in the Hackley case.

The great weight of authority followed in Virginia, is that it is not necessary that the circumstances establish negligence as the proximate cause with such certainty as to exclude every possible conclusion. In the case of *Bly* vs. *Southern Railway Company*, 183 Va. 162; 31 S.E.2d 564 (1944), the Virginia Supreme Court of Appeals, regarding the question of proximate cause, adopted the salutary language of this Honorable Court in the holding of *Tennant* vs. *Peoria and Pekin Union Company*, 321 U.S. 29, 64 S.C. 412, 88 L.ed.:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and un-

certain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

CONCLUSION

For the reasons aforementioned, it is respectfully submitted that petitioner is not entitled to the relief prayed for by him and, accordingly we pray that the Writ of Certiorari be denied.

PATRICIA L. KISSINGER,
Administratrix of the Estate of
LEE N. KISSINGER, Deceased,
and H. M. Stern, Ancillary
Administrator

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I, Stanley E. Sacks, attorney for Patricia L. Kissinger, Administratrix of the Estate of Lee N. Kissinger, Deceased, and H. M. Stern, Ancillary Administrator, respondents herein, and a member of the Bar of the

Supreme Court of the United States, hereby certify that on the ninth day of January, 1963, I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the petitioner, James Frankhouser, by mailing a copy in a duly addressed envelope with first class postage prepaid to his attorney of record as follows:

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